

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Now before the Court is defendants' joint motion for summary judgment.² Plaintiff has not filed an opposition.³

FACTUAL BACKGROUND⁴

Plaintiff was at all times relevant to the complaint a prisoner housed at PBSP. (Pl.'s Compl. ¶ 5.) Plaintiff became a member of the "Church of the Creator" in or around October 2003. (Decl. S. Tama Supp. Defs.' Mot. Summ. J. ("Tama Decl."), Ex. D at 2:3-4.) The primary objective of the Church of the Creator is the "survival, expansion and advancement of the white race." (*Id.* at 3:11-14.) Three publications by the Church of the Creator constitute the "Creed of Creativity": "Nature's Eternal Religion," "The White Man's Bible," and "Salubrious Living." (Pl.'s Compl. ¶ 26.) "Creativity," the religion of the Church of the Creator, recommends that its members follow a lifestyle known as "salubrious living." (*Id.* ¶ 24.) Creative Credo No. 5 defines "salubrious living" as "an effective, systematic program for the upgrading of the health and vigor of our precious White Race." (Tama Decl., Ex. D at 2:8-12.) Creative Credo No. 6 recommends its members eat a "frugitarian" diet. (*Id.* at 2:15-18.) Such a diet, which plaintiff refers to as a "raw-food diet," consists of food that has been organically grown, and is "uncooked, unprocessed, unpreserved and not tampered with in any other way." (Pl.'s Compl. ¶ 25.) Creativity believes in, but does not require, that its members follow a raw-food diet. (Tama Decl., Ex. D at 3:28-4:5.) The "16 Commandments of Creativity" do not discuss "salubrious living" or require that its members follow a raw-

²On December 12, 2006, after the instant motion was filed, the Court dismissed all claims against defendant Somera because of plaintiff's failure to serve him, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.

³In its order of service, the Court explained to plaintiff what he must do to oppose a motion for summary judgment filed by defendants. According to the briefing schedule set forth in that order, plaintiff's opposition to the summary judgment motion would be due thirty days after defendants filed their motion. On December 4, 2006, twenty-one days after defendants filed the instant motion, plaintiff filed a request for an extension of time to file his opposition to the motion. On December 12, 2006, the Court granted plaintiff's request, and ordered him to file his opposition on or by January 12, 2007. Plaintiff did not file an opposition, and has not communicated with the Court since the date it issued its order granting an extension of time.

⁴Except where otherwise noted, the facts set forth in the background section are not disputed by the parties.

1 food diet. (Id. at 4:13-17.)

2 PBSP offers only one Special Religious Diet (“SRD”). The SRD is prepared by the
3 Institution’s Food Service, and reviewed and approved by the prison dietitian. The diet is
4 made up of food items within the normal institutional food supplies, excluding beef, pork,
5 and poultry. (Decl. R. Bliesner Supp. Defs.’ Mot. Summ. J. (“Bliesner Decl.”) ¶ 2.)

6 The Protestant Chaplain at PBSP, defendant Bliesner, is the SRD Coordinator. He
7 does not provide food services; it is his responsibility to establish inmate eligibility for a
8 SRD, and to place inmates on the SRD list provided to the Food Service Manager. (Id. ¶ 1.)
9 PBSP inmates who wish to receive an SRD must first send Bliesner an “Inmate Request for
10 Interview” form, stating that they would like to participate in the SRD Program. (Id. ¶ 3.)

11 On September 9, 2004, plaintiff sent Bliesner an “Inmate Request for Interview” form
12 in which he inquired as to the process for applying for an SRD. (Pl.s Compl. ¶ 13; Bliesner
13 Decl., Ex. A.) After receiving the form, Bliesner sent plaintiff a memorandum on September
14 11, 2004, outlining the procedures inmates must follow to obtain an SRD. The memorandum
15 informs inmates they must identify their religious preferences, and requires they provide
16 Bliesner with information regarding the dietary habits of their religious group, as well as
17 some form of verification of their personal association or involvement with that religious
18 group. (Bliesner Decl. ¶ 4 & Ex. B.) Plaintiff sent Bliesner another “Inmate Request for
19 Interview Form” on November 14, 2004, stating he was still trying to obtain an SRD. He did
20 not state his religious preference on the form. (Bliesner Decl. ¶ 5 & Ex. C.) Bliesner then
21 sent plaintiff another copy of the SRD memorandum. On December 8, 2004, plaintiff filed
22 an inmate appeal, again requesting that he receive an SRD. In that appeal, he identified his
23 religious preference as a member of the Church of the Creator. (Tama Decl. ¶ 6 & Ex. B.)

24 When an inmate claims a religious preference and requests an SRD, Bliesner only
25 evaluates whether the inmate’s claimed religion exists and whether the inmate is able to
26 demonstrate at a cursory level that he knows the tenets of his faith. Bliesner’s investigation
27 into an inmate’s claimed religious preference is for identification purposes only; Bliesner
28 does not evaluate the merits of the claimed religion. (Bliesner Decl. ¶ 7.)

1 With respect to plaintiff's request, Bliesner researched the Church of the Creator on
2 the Internet, and determined that it did exist, and that its followers were predominantly
3 vegetarian. Bliesner did not notice that a raw-food diet was recommended. At that point,
4 Bliesner determined that plaintiff had met the basic requirements necessary to be provided
5 with an SRD. (*Id.*) Bliesner granted plaintiff's inmate appeal on January 4, 2005, issued a
6 "chrono" that plaintiff receive a special religious vegetarian diet, and placed plaintiff on the
7 SRD list. (Tama Decl., Ex. B; Bliesner Decl. ¶ 7 & Ex. E.) The SRD chrono informed
8 plaintiff that "Food Service will not honor [a] personal preference request that voids the
9 nutritional value of the Dietitian's approved Diet." (Bliesner Del. ¶ 8.)

10 On January 10, 2005, plaintiff sent Bliesner another "Inmate Request for Interview"
11 form, in which he indicated that he was a "fruitarian," not a vegetarian. In response,
12 Bliesner wrote plaintiff a memorandum on January 23, 2005, informing him that PBSP offers
13 only one SRD, and reminding him that the institution would not honor a dietary request that
14 voids the nutritional value of the prison dietitian's approved diet. (*Id.* ¶ 10.)

15 Also on January 10, 2005, plaintiff appealed Bliesner's decision to the first formal
16 level of review. (Tama Decl., Ex. B at 1.) Defendant Gomez, the Supervising Correctional
17 Cook, conducted an interview of plaintiff regarding his appeal. (*Id.* at 5.) Plaintiff's appeal
18 was denied because his request to be provided with uncooked foods would have voided the
19 nutritional value of the California Department of Corrections and Rehabilitation's dietitian's
20 approved diet. (*Id.*) Plaintiff appealed the decision to the second level of review, and stated
21 that because his dietary needs were being denied, he was requesting an emergency transfer to
22 another institution equipped to accommodate his needs. (*Id.* at 3.)

23 Defendant Somera, a Correctional Counselor, reviewed plaintiff's appeal at the second
24 level of review, and researched the Church of the Creator. His research revealed that the
25 Church of the Creator is an Oregon-based church founded in 1969, and that the Church of the
26 Creator is the public ministry expression of Te-Ta-Ma Truth Foundation. He further
27 discovered that the Oregon-based Church of the Creator does not make any reference to a
28 special diet requiring raw foods or salubrious living. Somera's findings regarding the Church

1 of the Creator were limited to the Oregon-based Church of the Creator, and not to plaintiff's
2 alleged religion of the same name based out of Florida. (Tama Decl., Ex. B at 6.)

3 Warden Kirkland partially granted plaintiff's appeal at the second level of review:
4 plaintiff's request to have his dietary needs met was granted because the food prepared at
5 PBSP was reviewed and approved by a dietitian; plaintiff's request for an emergency transfer
6 was denied. (Tama Decl., Ex. B at 6.)

7 DISCUSSION

8 A. Legal Standard

9 Summary judgment is proper where the pleadings, discovery and affidavits show there
10 is "no genuine issue as to any material fact and that the moving party is entitled to judgment
11 as a matter of law." See Fed. R. Civ. P. 56(c). Material facts are those that may affect the
12 outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A
13 dispute as to a material fact is genuine if the evidence is such that a reasonable jury could
14 return a verdict for the nonmoving party. See id.

15 The court will grant summary judgment "against a party who fails to make a showing
16 sufficient to establish the existence of an element essential to that party's case, and on which
17 that party will bear the burden of proof at trial . . . since a complete failure of proof
18 concerning an essential element of the nonmoving party's case necessarily renders all other
19 facts immaterial." See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); see also
20 Anderson v. Liberty Lobby, 477 U.S. at 248 (holding fact is material if it might affect
21 outcome of suit under governing law; further holding dispute about material fact is genuine
22 "if the evidence is such that a reasonable jury could return a verdict for the nonmoving
23 party"). The moving party bears the initial burden of identifying those portions of the record
24 that demonstrate the absence of a genuine issue of material fact. The burden then shifts to
25 the nonmoving party to "go beyond the pleadings, and by his own affidavits, or by the
26 'depositions, answers to interrogatories, or admissions on file,' designate 'specific facts
27 showing that there is a genuine issue for trial.'" See Celotex, 477 U.S. at 324 (citing Fed. R.
28 Civ. P. 56(e)).

1 In considering a motion for summary judgment, the court must view the evidence in
 2 the light most favorable to the nonmoving party; if, as to any given fact, evidence produced
 3 by the moving party conflicts with evidence produced by the nonmoving party, the court
 4 must assume the truth of the evidence set forth by the nonmoving party with respect to that
 5 fact. See Leslie v. Grupo ICA, 198 F.3d 1152, 1158 (9th Cir. 1999). The court's function on
 6 a summary judgment motion is not to make credibility determinations or weigh conflicting
 7 evidence with respect to a disputed material fact. See T.W. Elec. Serv. v. Pacific Elec.
 8 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

9 A district court may not grant a motion for summary judgment solely because the
 10 opposing party has failed to file an opposition. Cristobal v. Siegel, 26 F.3d 1488, 1494-95 &
 11 n.4 (9th Cir. 1994). The court may, however, grant an unopposed motion for summary
 12 judgment if the movant's papers are themselves sufficient to support the motion and do not
 13 on their face reveal a genuine issue of material fact. See United States v. Real Property at
 14 Incline Village, 47 F.3d 1511, 1519-20 (9th Cir. 1995) (holding local rule cannot mandate
 15 automatic entry of judgment for moving party without consideration of whether motion and
 16 supporting papers satisfy Fed. R. Civ. P. 56), rev'd on other grounds sub nom. Degen v.
 17 United States, 517 U.S. 820 (1996).

18 B. Analysis

19 The First Amendment guarantees the right to the free exercise of religion. Cruz v.
 20 Beto, 405 U.S. 319, 323 (1972). "The free exercise right, however, is necessarily limited by
 21 the fact of incarceration, and may be curtailed in order to achieve legitimate correctional
 22 goals or to maintain prison security." O'Lone v. Shabazz, 482 U.S. 342, 348 (1987). In order
 23 to establish a free exercise violation, a prisoner must show the defendant burdened the
 24 practice of his religion, by preventing him from engaging in conduct mandated by his faith,
 25 without any justification reasonably related to legitimate penological interests. Freeman v.
 26 Arpaio, 125 F.3d 732, 736 (9th Cir.1997) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)).

27 Here, plaintiff alleges defendants have violated his First Amendment right to free
 28 exercise of his religion by denying him his preferred religious diet. The Ninth Circuit has

1 held that inmates “have the right to be provided with food sufficient to sustain them in good
2 health that satisfies the dietary laws of their religion.” Ward v. Walsh, 1 F.3d 873, 877 (9th
3 Cir. 1993) (internal quotation and citation omitted.) Consequently, the refusal by prison
4 officials to provide a healthy diet conforming to sincere religious beliefs may violate the First
5 Amendment. See id.

6 At the outset, defendants argue that plaintiff cannot show a constitutional violation
7 because the Church of the Creator is not a religion entitled to First Amendment protection.
8 To assess whether a belief or movement invokes constitutionally cognizable religious
9 interests, the Ninth Circuit has adopted the following three-part test:

10 First, a religion addresses fundamental and ultimate questions having to do
11 with deep and imponderable matters. Second, a religion is comprehensive in
12 nature; it consists of a belief-system as opposed to an isolated teaching. Third,
a religion often can be recognized by the presence of certain formal and
external signs.

13 Alvarado v. City of San Jose, 94 F.3d 1223, 1229-30 (9th Cir. 1996) (quoting Africa v.
14 Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981), cert. denied, 456 U.S. 908 (1982)).

15 Defendants argue the Church of the Creator fails to qualify as a constitutionally-
16 cognizable religion under the three-part test. First, defendants argue, the Church of the
17 Creator’s primary objective, rather than focusing on “ultimate questions” and “deep and
18 imponderable matters,” is white supremacy, which is to be accomplished through violence in
19 the form of a “Racial Holy War.” Second, defendants argue, the doctrine of the Church of
20 the Creator consists of an “isolated teaching” of white supremacy, and not a comprehensive
21 belief system. Finally, defendants argue, any “formal and external” signs displayed by the
22 Church of the Creator (such as its hierarchical structure and five celebrated holidays) are of a
23 secular, rather than religious, nature.

24 In Alvarado, the Ninth Circuit recognized that defining religion for First Amendment
25 purposes is a task that is “notoriously difficult, if not impossible.” Id. at 1227. In the instant
26 case, the record does not provide the Court with much guidance in applying Alvarado’s
27 three-part test. In Alvarado, the Ninth Circuit applied the three-part test to determine
28 whether a publicly-funded sculpture was “religious,” or secular in nature. In so doing, the

1 Ninth Circuit relied upon a fully-developed factual record regarding the possible religious
2 significance of the sculpture. Id. at 1229-31. By contrast, in the instant case, the record is
3 sparse regarding the overarching doctrinal parameters of the Church of the Creator. While it
4 is clear that the objective of white supremacy is central to the Church of the Creator's
5 doctrine, defendants' assertion that the doctrine does not satisfy the elements of the three-part
6 test is not as evident. Viewed in the light most favorable to plaintiff, the evidence relied
7 upon by defendants does not establish, as matter of law, that the Church of the Creator is not
8 entitled to the religious protections of the First Amendment. Accordingly, the Court
9 assumes, without deciding, that the Church of the Creator is a religion within the meaning of
10 the First Amendment.

11 The Court next turns to the second step in the analysis, the question of whether eating
12 a raw-food diet is "mandated" by plaintiff's faith. See Freeman, 125 F.3d at 736. The Ninth
13 Circuit explained in Freeman: "In order to reach the level of a constitutional violation, the
14 interference with one's practice of religion must be more than an inconvenience; the burden
15 must be substantial and an interference with a tenet or belief that is central to religious
16 doctrine." 125 F.3d at 737 (internal quotation and citation omitted). The record is adequately
17 developed regarding whether a raw-food diet is mandated by the Church of the Creator, and
18 the Court finds no such mandate. The allegations in plaintiff's complaint, along with
19 plaintiff's answers to defendants' interrogatories, establish the following undisputed facts:
20 Creativity recommends that its members follow a lifestyle known as "salubrious living,"
21 (Pl.'s Compl. ¶ 24); Creative Credo No. 5 defines "salubrious living" as "an effective,
22 systematic program for the upgrading of the health and vigor of our precious White Race,"
23 (Tama Decl., Ex. D at 2:8-12.); Creative Credo No. 6 recommends its members eat a
24 "frugitarian," or raw-food, diet, (id. at 2:15-18; Pl.'s Compl. ¶ 25); Creativity believes in, but
25 does not require, that its members follow a raw-food diet, (Tama Decl., Ex. D at 3:28-4:5);
26 the "16 Commandments of Creativity" do not discuss "salubrious living" or require that its
27 members follow a raw-food diet, (id. at 4:13-17). The Court finds defendants' moving
28 papers are sufficient to support summary judgment and that the evidence submitted by

defendants does not, on its face, reveal a genuine issue of material fact as to whether a raw-food diet is mandated for members of the Church of the Creator. See Real Property at Incline Village, 47 F.3d at 1520.⁵

In sum, plaintiff has failed to make a showing sufficient to establish the existence of an element essential to his case, specifically, that defendants prevented him from engaging in conduct mandated by his faith.⁶ Accordingly, summary judgment will be granted in favor of defendants. See Celotex, 477 U.S. at 322-23.

CONCLUSION


For the reasons stated, defendants' motion for summary judgment is hereby GRANTED and judgment shall be entered in favor of all defendants.

This order terminates Docket No. 23.

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: September 21, 2007


 MAKINE M. CHESNEY
 United States District Judge

⁵Defendants do not argue that their decision to deny plaintiff a raw-food diet was rationally related to a legitimate penological purpose. See Freeman, 125 F.3d at 736. Because the Court finds a raw-food diet was not mandated by plaintiff's religion, the final analytical step is not required. The Court notes, however, that the Ninth Circuit has recognized that prisons have "a legitimate penological interest in running a simplified food service, rather than one which gives rise to many administrative difficulties," see Ward, 1 F.3d at 877, and has found: "[t]he policy of not providing special diets is related to simplified food service," id.

⁶In light of this finding, the Court does not reach defendants' arguments that they are entitled to qualified immunity, that defendant Kirkland cannot be held liable as a supervisor, and that plaintiff's suit is barred under 42 U.S.C. § 1983 because he did not suffer any physical injury.